

**IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re

DELPHI CORP. *et al.*,

Debtors.

)
)
) Chapter 11
)

)
) Case No. 01-16034 (AJG)
)

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) (Jointly Administered)
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**MOTION OF CERTAIN FORMER EMPLOYEES OF DEBTOR
FOR LIMITED RELIEF FROM THE AUTOMATIC STAY, TO THE
EXTENT APPLICABLE, TO PAY AND/OR ADVANCE DEFENSE
COSTS UNDER THE DEBTORS' INSURANCE POLICIES**

TO THE HONORABLE ROBERT D. DRAIN,
UNITED STATES BANKRUPTCY JUDGE:

Former employees of Delphi Corporation (the "Debtor" or "Dephi"), J.T. Battenburg III, Alan S. Dawes, Paul R. Free, John G. Blahnik, Milan Belans, Catherine Rozanski, Pamela Geller, Peter Janak and Laura Marion (collectively "Movants"), by and through their undersigned counsel, enter a limited appearance solely for the purpose of moving the Court pursuant to 11 U.S.C. § 362(d) for relief from the automatic stay, to the extent applicable, permitting National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") to advance and/or pay under certain insurance policies covered defense costs being incurred by the Movants in pending and future lawsuits, proceedings and investigations, subject to

National Union fully reserving its rights and defenses and the execution of a written undertaking by each of the Movants to repay any amounts advanced if it ultimately is determined that they are not entitled to coverage. Movants do not consent to jurisdiction over them for any other purpose, and respectfully submit as follows:

JURISDICTION

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. § 1409.

BACKGROUND

2. Commencing on October 8, 2005 and, in some instances, periodically thereafter, the Debtor and certain of its subsidiaries and affiliates (collectively “the Debtors”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Pursuant to its authority under section 1102 of the Bankruptcy Code, the United States Trustee for the Southern District of New York appointed an official committee of unsecured creditors.

3. On October 8, 2005, the Debtor also filed a motion seeking *inter alia*, the authority but not the obligation or direction to advance costs and expenses to former Employees and Directors on the following terms: (1) the amount available to former Employees and Directors for such expenses is subject to an aggregate cap of \$ 5 million; (2) advancement would only be available on a case-by-case basis subject to approval by the

Compensation Committee of the Board of Directors of Delphi Corporation; (3) advancement would only be available for expenses not otherwise reimbursable from other third parties. This Court granted Debtor's motion the same day.

4. On February 13, 2006, the Compensation Committee of the Board of Directors of Delphi Corporation ceased advancement of expenses to certain Movants. These Movants were notified of the Compensation Committee's decision through individualized letters. Copies of those letters are attached hereto as Exhibit C. The letters provide no explanation of the Compensation Committee's decision and instead, merely indicate that it "decided not to approve the payment of the post-petition outstanding balance, nor to pay for the future fees and expenses that you may incur in your representation." Other Movants continued to receive advancement of their legal fees and expenses for a period thereafter; however, advancement to all Movants has now ceased.

5. Movants believe that Debtors have an ongoing obligation to continue to advance fees and expenses. Accordingly, certain Movants have filed a separate Motion to Compel Delphi Corporation to Advance Legal Fees and Costs pursuant to its contractual and statutory indemnification obligations.

6. Notwithstanding Movants' belief that Delphi has an obligation to advance fees and costs, Movants are also former officers, directors and/or employees of Delphi Corporation and insureds under a Directors and Officers Liability Insurance Policy and Employee Benefit Plan Fiduciary Liability Insurance Policy. As a result, Movants believe that they are also entitled to advancement of fees and costs pursuant to the terms of those insurance

programs, and file this motion to lift the bankruptcy stay and permit National Union to distribute insurance proceeds.

**Directors and Officers Liability Insurance
And ERISA Fiduciary Liability Insurance**

7. In 2004, Delphi Corp. purchased a Directors and Officers Liability Insurance Policy from National Union, Policy Number 931-88-56, a copy of which is annexed hereto as Exhibit A. This policy (the “National Union D&O Policy”), subject to its terms, conditions and exclusions, provides insurance coverage for legal fees and associated expenses (including expert fees) incurred in defending covered “Claims” (the “D&O Defenses Costs”). This coverage is provided directly to or on behalf of present and former officers, directors and employees of the Debtor and certain affiliates of the Debtor, when such individuals have not been indemnified by the Debtor. *See* National Union D&O Policy, Coverage A of the insuring agreements. The National Union D&O Policy provides reimbursement to the Debtor to the extent that it indemnifies the present and former officers, directors and employees for covered loss. *See National Union D&O Policy, Coverage B of the insuring agreements, as amended by endorsements No. 6 and No. 13.* The National Union D&O Policy has a \$10,000,000 self-insured retention which only applies to indemnifiable loss (*i.e.* loss which the Debtor is required or permitted to indemnify the individual insureds).

8. Delphi Corp. supplemented the coverage provided under the National Union D&O Policy with a number of excess policies from a number of different insurance carriers.

9. In 2004, Delphi Corp. also purchased an Employee Benefit Plan Liability Insurance Policy from National Union, Policy No. 931-88-61 (the “National Union Fiduciary

Policy”), a copy of which is annexed hereto as Exhibit B. The National Union Fiduciary Policy, subject to its terms, conditions and exclusions, provides coverage to Delphi Corp., its Employee Benefit Plans, the Employee Benefit Plans of its debtor and non-debtor affiliates, and their respective past, present or future officers, directors and/or employees in their capacities as fiduciaries or trustees and certain persons performing administration of any Employee Benefit Plan. The National Union Fiduciary Policy provides insurance coverage for, among other matters, legal fees and related expenses (including expert fees) incurred in defending covered “Claims” against covered insureds.

10. The National Union Fiduciary Policy and the National Union D&O Policy (collectively, the “Policies”) apply to covered Claims first made during the period from February 5, 2004 through February 5, 2005.

11. As noted, the Policies generally provide that, subject to certain conditions and other terms, National Union will pay, among other things, the legal fees and related expenses of the Debtors’ covered directors, officers, plan committee members, certain trustees, fiduciaries, administrators, and other employees (collectively, “Insureds”) incurred in the defense or appeal of a covered Claim, subject to the applicable terms of the Policies.

12. The National Union D&O Policy provides no coverage for any Claim against the Debtor, including any coverage for fees, costs or liability. The National Union D&O Policy only provides coverage for Claims against the Debtor’s former and current officers, directors and employees, and, to the extent Loss is indemnifiable by the Debtor, will reimburse the Debtor for the advancement of fees and expenses to current and former directors,

officers, and employees, subject to the terms of the National Union D&O Policy. *See National Union D&O Policy, Endorsement No. 13.*

13. National Union's D&O Policy defines "Indemnifiable Loss" as any "Loss for which an Organization has indemnified or is permitted or required to indemnify an Insured Person pursuant to law or contract or the charter, bylaws, operating agreement or similar documents of an Organization." *See National Union D&O Policy, Clause 2, paragraph (m).*

14. Section V, Clause 19 of Endorsement 13, further provides that:

The coverage provided under this policy is intended as a matter of priority to protect and benefit **Insured Persons** such that, in the event of bankruptcy of the **Organization**, the **Insurer** shall first pay **Loss** under Coverages A and C [*i.e.*, non-indemnifiable Loss] prior to paying **Loss** under Coverage B [*i.e.*, indemnifiable Loss].

(Exhibit A at MDL000055 (emphasis in original).) As a result of this priority of payment provision, any interest that Delphi Corporation might have in the National Union D&O Policy is secondary to the interests of the Movants.

Lawsuits

15. As early as summer 2004, Delphi publicly disclosed that the company was the subject of investigations by the Securities and Exchange Commission involving Delphi's accounting for and disclosures related to certain transactions. In 2005, Delphi added that it was also the subject of an investigation by the Department of Justice and other federal authorities. *See, e.g.*, Delphi Form 10-Q, filed August 8, 2005, attached hereto as Exhibit D ("Delphi is the subject of an ongoing investigation by the Staff of the Securities and Exchange Commission ('SEC') and other federal authorities involving Delphi's accounting for and the

adequacy of disclosures for a number of transactions dating from Delphi's spin-off from GM. Delphi is fully cooperating with the SEC's ongoing investigation and requests for information as well as the related investigation being conducted by the Department of Justice.").

16. In June 2005, the press reported that the Justice Department "stepped up a massive investigation" upon completion of an internal review by Delphi that reportedly "found misconduct among former employees." David Shepardson, *Feds Expand Delphi Probe*, DETROIT NEWS, June 30, 2005 at A1, attached hereto as Exhibit E.

17. Delphi and certain Movants are also defendants in numerous lawsuits (the "Lawsuits"), including numerous purported class actions against the Defendants alleging *inter alia* violations of federal and state securities laws and the Employee Retirement Income Security Act of 1974 ("ERISA"). Most of these cases have been consolidated before Judge Gerald Rosen of the United States District Court for the Eastern District of Michigan.

18. On February 10, 2006, Judge Rosen entered a Scheduling Order in *In re Delphi Corporation Securities, Derivative and "ERISA" Litigation* that set schedules for motions to dismiss and other motion practice.

19. All briefing in support of, and opposition to, motions to dismiss in the securities class action and ERISA litigation is complete. The motions are awaiting decision by Judge Rosen.

20. Pursuant to the Private Securities Litigation Reform Act, all discovery in the securities class action, as well as related discovery in the ERISA action, has been stayed. In the event that some or all of the motions to dismiss are denied, class and fact discovery will commence.

21. Movants Alan Dawes, John Blahnik and Paul Free have incurred and continue to incur legal fees and expenses in the Lawsuits. All of the Movants have incurred and continue to incur legal fees and expenses related to the aforementioned investigations of Delphi and in response to subpoenas issued by the Securities and Exchange Commission related to its investigation of Delphi's accounting practices and adequacy of financial disclosures.

22. Thus, Movants are seeking interim payment or advancement of Defense Costs by National Union pursuant to the Policies.

23. National Union has fully reserved all of its rights and defenses under the Policies and available at law with respect to the Lawsuits and investigations and any related matters.

24. Subject to the applicable terms of the Policies, National Union will pay or advance reasonable and necessary Defense Costs to Movants (as well as to all other current and former directors, officers and employees defending against covered Claims and, unlike Movants, being indemnified by Delphi), subject to: (a) National Union's full reservation of rights as described above; and (b) other standard conditions, such as the execution by each covered Movant of a binding written undertaking (an "Undertaking") to repay all monies advanced if it ultimately is determined that the individual is not entitled to insurance coverage.

RELIEF REQUESTED AND BASES THEREFORE

Movants Seek Relief from the Stay to the Extent Applicable

25. To the extent the automatic stay may apply to the Policies and their proceeds, Movants seek entry of an order granting relief from the automatic stay for purposes

of payments and/or advancements by National Union of reasonable and necessary Defense Costs. Movants are not requesting that this Court approve, review or otherwise become involved in any dispute that might arise with National Union regarding what amounts are or are not reasonable, necessary, covered or otherwise owing under the Policies.

26. Movants anticipate that some creditors may contend that the Policies and/or proceeds are the property of the Debtor, and cannot be dissipated through the advancement of legal fees and costs to insureds under the Policies. The terms of the Policies as well as applicable law belie any such argument.

27. First, the D&O Policy expressly excludes coverage for any attorneys' fees, costs or liability incurred in connection with the defense of any claim against the Debtor (*i.e.* the Policy provides no entity coverage). Instead, the D&O Policy provides that the Debtor shall receive proceeds "only to the extent [it] has indemnified [an] Insured Person." (Exhibit A at MDL000050.) Thus, the Debtor has no independent claim to any of the D&O Policy proceeds. Any claim that the Debtor might have to the proceeds of the D&O Policy is derivative of the Movants', or other Insured Persons', rights to coverage and is limited to amounts advanced or provided as indemnification to such Insured Persons.

28. Second, the Priority of Payments provision, Section V, Clause 19 of Endorsement 13, referenced above, makes clear that advancement of defense costs directly to Insured Persons, as well as any settlement or judgment in covered actions, is payable before any interest of the Debtor.

The coverage provided under this policy is intended as a matter of priority to protect and benefit **Insured Persons** such that, in the event of bankruptcy of the **Organization**, the **Insurer** shall first

pay **Loss** under Coverages A and C prior to paying **Loss** under Coverage B.

(Exhibit A at MDL000055 (emphasis in original).)

29. Finally, although courts have routinely held insurance policies to be property of the estate, *see, e.g., In re Edgeworth*, 993 F.2d 51, 55 (5th Cir.1993); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 92 (2d Cir.1988); *In re A.H. Robins*, 788 F.2d 994, 1001 (4th Cir.1986); *Scrima v. John Devries Agency, Inc.*, 103 B.R. 128, 132 (W.D. Mich. 1989), most courts have held *the proceeds* from similar insurance policies belong to the insureds, not the estate. *See, e.g. In re Medex Regional Laboratories, LLC*, 314 B.R. 716 (E.D. Tenn. 2004); *In re Allied Digital Technologies, Corp.*, 306 B.R. 505 (D. Del. 2004). Even those courts that have held that the proceeds of similar insurance policies belong to the estate found good cause existed to permit advancement of defense fees and costs to insureds, with residual interest to the estate. *See, e.g., In re Arter & Hadden, L.L.P.*, 335 B.R. 666 (N.D. Ohio 2005).

NOTICE

30. Notice of this Motion has been given in accordance with the Court's Amended Case Management Order Establishing, Among Other Things, Noticing Electronic Procedures, Hearing Dates, Independent Website And Alternative Methods of Participation At Hearings. Movants believe that such notice is appropriate under the circumstances of this Motion, and submit that no other or further notice of the Motion and the hearing thereon need be given.

WAIVER OF MEMORANDUM OF LAW

31. Pursuant to Local Bankruptcy Rule for the Southern District of New York 9013-1(b), because there are no novel issues of law presented herein, Movants respectfully request that the Court waive the requirement that Movants file a memorandum of law in support of this Motion.

NO PRIOR REQUEST

32. No prior request for the relief sought herein has been made to this or any other Court.

WHEREFORE, Movants respectfully requests that the Court enter an order granting the relief requested herein, and such other and further relief as may be just.

Dated: New York, New York
October 18, 2006

Respectfully submitted,

s/Robert M. Stern

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CERTIFICATE OF SERVICE

I, ROBERT M. STERN, certify that I caused true and correct copies of the foregoing Motion Of Certain Former Employees Of Debtor For Limited Relief From The Automatic Stay, To The Extent Applicable, To Pay And/Or Advance Defense Costs Under The Debtors' Insurance Policies to be served on all counsel on Exhibit A by electronic mail and all counsel on Exhibit B by First Class Mail this 19th day of October 2006.

/s/

Robert M. Stern

EXHIBIT A

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